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Chung Kuo Ping @ Richard v Malaysian Assurance Alliance Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-04–8 OF 2003

MOKHTAR SIDIN, MOHD GHAZALI AND TENGKU BAHARUDIN SHAH JJCA

28 AUGUST 2007

C

Insurance — Duty of disclosure — Material non-disclosure — Special perils policy — Previous claims history pertaining to total loss not disclosed — Whether entitled defendant to repudiate contract

D

Insurance — Proposal form — Material misdescription — Insured described as an individual trading as Sdn Bhd — Whether there was such a legal entity

E

Plaintiffs/appellant claimed against the defendant/respondent in respect of the first summons, vehicle Kenworth Logging Truck registered as SK 1921 and its trailer registered as SK 1922 ('KLT') and in respect of the second summon, Pacific Logging Truck with registration No SU 3189 and its trailer F ('PLT') on an insurance policy with regard to an accident on 17 November 1993. The defendant denied liability and contended inter alia that the plaintiffs or each of them had no insurable interest in the said logging truck at the inception of the said insurance policy as the plaintiffs or each of them were/was not the registered legal owner/s of the logging truck. The legal G ownership was claimed by B-Trak Sdn Bhd of Sandakan and was not vested in any of the plaintiffs. In respect of the KLT and the PLT, the person named as the insured in both the proposal note and the insurance policy was stated as Mr Chung Kuo Ping @ Richard T/A Sri Gemawan Sdn Bhd, Chun Chao Lung Timber (Contracting) Company Sdn Bhd and Rapid Growth Sdn Bhd. H The registration card of the KLT and its trailer had the name of Sri Gemawan as the owner and this took place in 1995. Prior to this the registered owner as stated on the registration card was Perusahaan Far (Sabah) Sdn Bhd. The name of Chung Kuo Ping @ Richard ('first plaintiff') could not be found on the registration card of the KLT. The first plaintiff claimed that he was the I owner because he was the one who purchased the KLT from B-Trak Sdn Bhd and the payment was made in cash. The defence also stated that the plaintiffs had suppressed their previous claims history to the defendants when filing up the special perils proposal form entitling them to repudiate the insurance. The issues were: (i) whether there was insurable interest as at the date of the

cover note dated 17 December 1992; (ii) whether the plaintiffs were the legal owners of the KLT and the PLT in order to sustain their cause of action; (iii) whether all the plaintiffs or anyone of them had any locus standi or legal interest to commence the summons against the defendants; (iv) whether the defendants were entitled to avoid the special perils policy and repudiate liability based on misrepresentation or non-disclosure of a material fact.

Held, dismissing the appeal:

(1) The first plaintiff himself gave evidence that some of the payments were made by Sri Gemawan Sdn Bhd, some by the third plaintiff, some by the fourth plaintiff and some by himself. What was not shown was the amount each plaintiff paid. Despite the evidence of the first plaintiff in respect of the payments, the letter from B-Trak Sdn Bhd dated 1 March 1994 showed that the purchaser was Sri Gemawan Sdn Bhd. That letter was the letter releasing the claim by B-Trak Sdn Bhd and thus allowing Sri Gemawan to be registered as the owner of the vehicle. As correctly pointed out by the learned sessions court judge in order for the first plaintiff to make a claim it must be shown that he was the owner or at least in possession of the vehicle when the accident took place. The first plaintiff failed to prove that he was the owner or was in possession of the said vehicle. When the accident took place, Sri Gemawan Sdn Bhd ('second plaintiff') registered itself as the owner of the said vehicle only in 1995 despite the fact that it received the release letter from B-Trak Sdn Bhd dated 1 March 1994 (see para 7).

(2) The person named to be insured in the proposal form and the person named as the insured was Mr Chung Kuo Ping @ Richard T/A Sri Gemawan Sdn Bhd, Chung Chao Lung Timber (Contracting) Company Sdn Bhd and Rapid Growth Sdn Bhd. The court was of the view that there was no such legal entity. The evidence showed that Mr Chung Kuo Ping @ Richard was an individual. On the other hand, Sri Gemawan Sdn Bhd, Chung Chao Lung Timber (Contracting) Company Sdn Bhd and Rapid Growth Sdn Bhd were three different companies incorporated under the Companies Act 1965. These were the plaintiffs in the original claims in the sessions court. Each of them had separate legal entity. It was clear that there was no legal entity of Chung Kuo Ping @ Richard T/A Sri Gemawan Sdn Bhd, Chung Chao Lung Timber (Contracting) Sdn Bhd and Rapid Growth Sdn Bhd (see para 8).

(3) Since the insurance policy was based on the proposal form the name of the insured followed the one in the proposal form. Since there was no legal entity named in the insurance policy, none of the four plaintiffs was named in the insurance policy. This was applicable to both the

plaintiffs' claim in respect of the KLT and the PLT because the insurance policy covered all the vehicles including the vehicles which were the subject matter in this appeal (see para 9).

[Bahasa Malaysia summary

Plaintif-plaintif/perayu menuntut terhadap defendan/responden berhubungan dengan saman pertama, kenderaan Kenworth Logging Truck didaftarkan sebagai SK 1921 dan trelernya yang didaftarkan sebagai SK 1922 ('KLT') dan berhubungan dengan saman kedua, Pacific Logging Truck dengan pendaftaran No SU 3189 dan trelernya ('PLT') di atas satu polisi insurans berhubungan dengan satu kemalangan pada 17 November 1993. Defendan menafikan liabiliti dan menegaskan antara yang lain bahawa plaintif-plaintif atau setiap daripada mereka tiada kepentingan yang boleh diinsuranskan di trak pembalakan tersebut pada permulaan polisi insurans tersebut oleh kerana plaintif-plaintif atau setiap daripada mereka tidak didaftarkan sebagai pemilik di sisi undang-undang trak pembalakan tersebut. Pemilik di sisi undang-undang adalah B-Trak Sdn Bhd dari Sandakan dan bukan terletak hak pada mana-mana daripada plaintif-plaintif tersebut. Berhubungan dengan KLT dan PLT, orang yang dinamakan sebagai En Chung Kuo Ping @ Richard T/A Sri Gemawan Sdn Bhd, Chun Chao Lung Timber (Contracting) Company Sdn Bhd dan Rapid Growth Sdn Bhd. Kad pendaftaran KLT dan trelernya mempunyai nama Sri Gemawan sebagai pemilik dan ini berlaku pada 1995. Sebelum ini pemilik berdaftar seperti yang dinyatakan di kad pendaftaran adalah Perusahaan Far (Sabah) Sdn Bhd. Nama Chung Kuo Ping @ Richard ('plaintif pertama') tidak dapat ditemui pada kad pendaftaran KLT. Plaintif pertama menyatakan bahawa beliau adalah pemilik oleh kerana beliau telah membeli KLT tersebut daripada B-Trak Sdn Bhd dan bayaran telah dibuat melalui wang tunai. Pembelaan juga menyatakan bahawa plaintif telah menyekat sejarah tuntutan mereka yang lepas kepada defendan apabila memfailkan borang cadangan risiko khas yang memberikan mereka hak untuk membatalkan insurans tersebut. Isu-isu adalah: (i) sama ada terdapat kepentingan yang boleh diinsuranskan pada tarikh nota lindungan bertarikh 17 Disember 1992; (ii) sama ada plaintif-plaintif adalah pemilik di sisi undang-undang KLT dan PLT untuk membolehkan mereka meneruskan dengan kausa tindakan; (iii) sama ada kesemua plaintif atau mana-mana di antara mereka mempunyai locus standi atau kepentingan undang-undang untuk memulakan saman terhadap defendan; (iv) sama ada defendan berhak mengelakkan polisi risiko khas dan membatalkan liabiliti berdasarkan salah nyata atau ketakdedahan fakta yang material.

Diputuskan, menolak rayuan:

(1) Plaintif pertama sendiri memberi keterangan bahawa beberapa bayaran

telah dibuat oleh Sri Gemawan Sdn Bhd, ada yang dibayar oleh plaintif ketiga, ada yang dibayar oleh plaintif keempat dan ada yang dibayar oleh plaintif pertama sendiri. Apa yang tidak ditunjukkan ialah amaun setiap plaintif bayar. Walaupun keterangan plaintif pertama berhubungan dengan bayaran-bayaran, surat daripada B-Trak Sdn Bhd bertarikh 1 Mac 1994 menunjukkan bahawa pembeli adalah Sri Gemawan Sdn Bhd. Surat tersebut adalah surat melepaskan tuntutan oleh B-Trak Sdn Bhd dan dengan itu membenarkan Sri Gemawan didaftarkan sebagai pemilik sah kenderaan tersebut. Seperti yang dinyatakan secara betul oleh mahkamah sesyen yang bijaksana untuk plaintif pertama membuat tuntutan ia mesti ditunjukkan bahawa beliau adalah pemilik ataupun sekurang-kurangnya mempunyai milikan kenderaan tersebut apabila kemalangan tersebut berlaku. Plaintif pertama gagal membuktikan bahawa beliau adalah pemilik atau mempunyai milikan kenderaan tersebut. Apabila kemalangan tersebut berlaku, Sri Gemawan Sdn Bhd ('plaintif kedua') mendaftarkannya sebagai pemilik kenderaan tersebut hanya pada 1995 walaupun fakta bahawa ia telah menerima surat perlepasan daripada B-Trak Sdn Bhd bertarikh 1 Mac 1994 (lihat perenggan 7).

(2) Orang yang dinamakan untuk mengambil insurans tersebut di borang tawaran dan orang yang dinamakan sebagai pengambil insurans adalah En Chung Kuo Ping @ Richard B/S Sri Gemawan Sdn Bhd, Chung Chao Lung Timber (Contracting) Company Sdn Bhd dan Rapid Growth Sdn Bhd. Mahkamah berpendapat bahawa tiada entiti undang-undang sebegini. Keterangan menunjukkan bahawa En Chung Kuo Ping @ Richard adalah seorang individu. Manakala, Sri Gemawan Sdn Bhd, Chung Chao Lung Timber (Contracting) Company Sdn Bhd dan Rapid Growth Sdn Bhd adalah tiga syarikat-syarikat berlainan yang ditubuhkan di bawah Akta Syarikat, 1965. Mereka adalah plaintif-plaintif saman yang asal di mahkamah sesyen. Setiap daripada mereka mempunyai entiti undang-undang yang berasingan. Ia adalah jelas bahawa tiada entiti undang-undang Chung Kuo Ping @ Richard B/S Sri Gemawan Sdn Bhd, Chung Chao Lung Timber (Contracting) Sdn Bhd dan Rapid Growth Sdn Bhd (lihat perenggan 8).

(3) Oleh kerana polisi insurans adalah berdasarkan borang tawaran nama pemegang insurans mengikut nama di borang tawaran. Oleh kerana tiada entiti undang-undang yang dinamakan di polisi insurans, tiada seorangpun daripada empat plaintif-plaintif tersebut yang dinamakan di polisi insurans tersebut. Ini adalah terpakai kepada kedua-dua tuntutan plaintif berhubungan dengan KLT dan PLT oleh kerana polisi insurans melindungi kesemua kenderaan-kenderaan termasuk kenderaan-kenderaan yang menjadi tajuk pokok rayuan ini (lihat perenggan 9).]

Notes

For cases on material non-disclosure, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 86–87.

For cases on material misdescription, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 342–343.

Cases referred to

China Insurance Co Ltd v Ngau Ah Kau [1972] 1 MLJ 52 (refd)

The Asia Insurance Co Ltd v Tat Hong Plant Leasing Pte Ltd [1992] 1 CLJ 330 (refd)

Edwin Tsen Tan Bing (Voo Sin Pei with him) (Tan Pang Tsen & Co) for the appellant.

Lim Pitt Kong (PK Lim & Co) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court):

[1] This appeal originated from the sessions court where there were two suits, namely Summons No 52–03 of 1996 and No 52-04 of 1996. In both cases initially there were several plaintiffs. At the High Court learned counsel for the plaintiffs discontinued the action by Chung Chao Lung Timber (Contracting) Company Sdn Bhd (third plaintiff) and Rapid Growth Sdn Bhd (fourth plaintiff) leaving the present appellant Chung Kuo Ping @ Richard and Sri Gemawan Sdn Bhd. When the matter came up in the High Court it was disclosed that Sri Gemawan Sdn Bhd had been wound up in January 1996 and as such the company has no *locus standi* to pursue the matter without a written consent from the liquidator, and thus leaving the first plaintiff alone as the appellant. The appeals before us are in respect of the two original suits in the sessions court now with only the first plaintiff as the appellant. We will refer to the parties as they were in the sessions court.

[2] The statement of claim in respect of Summons No 52–03 of 1996 is as follows:

1. The plaintiffs are the legal owner of a unit of Kenworth Logging Truck paccar complete with peerless trailer bearing Engine No 10521826, Chassis No 1518398 and trailer chassis No 0581 bearing registration No SK 1921 and SK 1922 respectively (the said logging truck).
2. The defendant is an insurance company with an office in Kota Kinabalu, Sandakan, Sabah and sells insurance policies.
3. Since 1988, the plaintiffs had been purchasing a special perils policy from the defendant in respect to a fleet of heavy equipments engaged in logging and sawmilling based in Tawau and Telupid. The above

mentioned logging truck is included in this policy which was renewed on a yearly basis including renewal from the 17 December 1992 until 16 December 1993 insurance policy No N993TA000005. Under the said policy the said logging truck and trailer were insured for a sum of RM250,000.

4. (a) On or about the 17 November 1993, the said logging truck was driven by an employee of the plaintiff, one Ricando Saavedra Enviguez (the driver) while working in a timber camp Ng Gaat, Kapit, Sarawak. The timber camp is known as Umas Camp B.

(b) At the material time the said logging truck was loaded with logs and fully fastened by steel cables, a standard industry practice.

The driver was driving slowly going downhill when he discovered the brakes were not working well. The driver wish to stop and took evasive action by driving to the side of the road or the side of a hill which will normally not only stop the truck but reduces damage compared with a run away truck.

Once the truck have been steered onto the side of the road the driver decided to jump to save his life. The loaded logging truck and trailer, driverless, already off the logging road, going downhill was caught in and stopped by the soft mud at the side of the road. The heavy truck and trailer very quickly sank in the soft mud and the very rapid rate of deceleration caused the restraining steel cables holding the logs to snap. The no longer restrained logs rushed forward by the momentum crushed the safety barrier tank, the truck's cabin, engine bay, steering and radiator. The said logging truck and trailer were badly damaged. The extent of the damage have been photographed and physically examined by the plaintiff's camp personnel and the defendant's insurance company appointed adjuster.

(c) The said logging truck had just been fully reconditioned in Sandakan prior to being shipped to Sarawak to work. The quality and extend of the reconditioning can be attested to by personal testimonies and photos taken at the time. In a timber camp it is a standing practice that all logging trucks are checked daily and in fact checked and adjusted several times a day. The said logging truck was checked and passed for work on the 14 December. Every one in a timber camp knows and know well that any system on a logging truck particularly the braking system that is not fully operational and in good maintenance means certain death very quickly to the driver and possibly others.

5. The said accident was reported to the defendants' agent within 14 days as stated in the insurance policy.

6. Under condition 7 of the insurance policy the plaintiffs shall take all reasonable steps to safeguard the said vehicles insured from loss or damage and to maintain them in an efficient condition and the defendant shall at all times have free and full access to examine the said vehicles or any part thereof or any operator or employees of the plaintiffs. The plaintiffs avers that the said vehicles were maintained in an efficient manner.

Particulars of maintenance

(1) The plaintiffs have gained a reputation as being very good at the following in respect to logging trucks:

(a) How to maintain trucks and logging trucks efficiently so as to maximize the performance and work capacity of the said trucks. This can only come from an understanding of the design applications and limitations of the manufacturers, to follow maintenance recommendations with the proper quality, lubricants and spare parts.

(b) The plaintiffs rebuilds, operates, maintains a mixed fleet of source fifty units of heavy off road trucks. The quality of the maintenance, the choice of replacement parts up grade, the quality of maintenance personal and the backing of a warehouse of spare parts with an inventory of nearly a million ringgit all goes to ownership and operation of a good and effective truck fleet.

(c) The Plaintiffs are capable of the very best truck rebuilding there is in Sabah with a large workshop equipped with sandblasting, chassis straightening, cut machine, lathes individual spray paint room, a team of skilled personal all dedicated to reconditioning and maintaining trucks and especially logging trucks.

(d) The quality of the plaintiffs modifications and maintenance have been widely acknowledged by many in the industry, independent workshops and engineering shops, drivers and mechanics adjusters local agents and representatives of Japanese and American truck manufacturers.

(e) The Plaintiffs to own and operate a fleet of source fifty logging trucks as an independent contractor, to be able to put to use different types of trucks to suit different applications with different terrain conditions in different part of Sabah and Sarawak requires rather more than even average maintenance abilities and capacity.

The plaintiff further maintains that:

(1) In the logging industry, a driver will not even attempt to start a truck if and when he believes that the truck has not been properly maintained and serviced;

(2) Any equipment, no matter of what brand and country of origin will very soon become non-operational and unavailable even when it had only very recently been commissioned from brand new;

(3) The plaintiffs have the track record of being one of the best in proper maintenance of equipments.

7. The defendant has knowledge of the accident and had inspected the vehicle and had found that the plaintiffs, their servants or agents were not at fault or breached any of the conditions of the said insurance policy.

8. On or about 15 June 1994 the defendant wrote to the plaintiffs to inform them that the defendant was repudiating the said insurance policy because the plaintiffs did not have any insurable interest over the said vehicle as the ownership had not been registered yet.

9. The plaintiffs had paid for the said vehicle when the same was purchased from B-Trak Sdn Bhd on or about 1 December 1987 and the legal ownership vests in the plaintiff's registration is only the document of title and since the plaintiffs had fully paid for the vehicle, they are the legal owner and therefore has an insurable interest over the said vehicle.

10. The defendant is liable to pay under the said insurance policy as the said vehicle was totally damaged beyond repair due to an accident.

11. Despite a demand made on the defendant to pay the sum insured, the defendant refused, failed and neglected to pay the sum of RM250,000.

12. The defendant had in a claim made by the plaintiffs in respect of the policy purchased from the defendant compensated the plaintiffs for the loss of vehicles bearing registration Nos SB 4056 and SB 4062 under claim No. N9910002, Policy No. N991TA00010 when an accident occurred on 6 January 1991. The defendant therefore had no basis to repudiate the said insurance policy on this ground. The plaintiffs are the legal owner in this case and although their name was not registered in the registration card.

And the plaintiffs claims against the defendant:

(a) the sum of RM250,000 together with interest at 8% per annum from 17 November 1993 until judgment and full payment under s 11 of the Civil Law Act 1956.

(b) Costs

Court fees RM 100

Solicitor fees RM2,875

(c) Further or other reliefs as the court deems fit.

[3] The defendant filed its defence which reads as follows:

(1) The defendant does not admit para 1 of the amended statement of claim and the plaintiffs are put to strict proof.

(2) In amplification of para 1 hereof and without prejudice thereto, the defendant avers as follows:

2.1 as the first plaintiff was at all material times trading as Sri Gemawan Sdn Bhd, who is the abovenamed second plaintiff herein, the second plaintiff as such has no *locus standi* to commence this action against the defendant. Alternatively, the first plaintiff has no *locus standi* to commence this action against the defendant since the second plaintiff was already a party to the proceedings. It is a duplicity for both the first and second plaintiffs to be joined as parties to the action in their capacity as plaintiffs in the action;

2.2 the third and fourth plaintiffs have no *locus standi* nor any legal interest to commence this action against the defendant since:

2.2.1 the third and fourth plaintiffs have not submitted any claims against the defendant. The defendant's motor vehicle accident report/claim Form dated 29 November 1993 was only submitted solely for himself. Further, notification of claim under the defendant's insurance policy was only given by the first plaintiff trading as the second plaintiff under the second plaintiff's letter dated 19 November 1993 to the defendant's agent and not by the other third and fourth plaintiffs; and

2.2.2 further or alternatively, as the defendant had received no notification of claim from the third and fourth plaintiffs within the deadline stipulated in the defendant's insurance policy which is a condition precedent of claim, the defendant is under no liability towards the third and fourth plaintiffs. The defendant is entitled to avoid liability under the said insurance policy.

(3) The rest of the defendant's defences hereinbelow is without prejudice to paragraphs 1 and 2 hereof but subject to the same.

(4) The defendant admits para 2 of the statement of claim.

(5) The defendant also admits para 3 of the statement of claim.

(6) The defendant does not admit para 4(a) of the statement of claim. With respect thereto, the defendant avers that the driver of the said logging truck was one Nujong Ak Unau (NRIC No K 0103317) and not one

Ricandо Saavedra Enviguez as alleged by the plaintiffs. The defendant also does not admit para 4(b) and (c) of the statement of claim and the plaintiffs are put to strict proof.

(7) In defence to para 5 of the statement of claim, the defendant does not admit the same but will rely on paras 2.1.1 and 2.1.2 hereof which the defendant repeats herein verbatim.

(8) Save for condition 7 of the insurance policy as alleged in para 6 of the statement of claim, the rest of the allegations therein are not admitted by the defendant and the plaintiffs are put to strict proof.

(9) The defendant also does not admit paras 6(1)(a), (b), (c), (d), & (e) and the rest of the allegations therein. The plaintiffs are put to strict proof.

(10) Notwithstanding the above averments, the defendant denies liability to the plaintiffs or any one of them based on the defendant's insurance policy No N993TA000005 on the following grounds:

10.1 that the plaintiffs or each of them have/has no insurable interest in the said logging truck at the inception of the said insurance policy as the plaintiffs or each of them were/was not the registered legal owner/s of the said logging truck. At the inception of the said policy, the legal ownership of the said logging truck was claimed by B-Trak Sdn Bhd of Sandakan and was not vested in any of the plaintiffs. The plaintiffs had thereby misrepresented or alternatively, by not disclosing that they are not the registered legal owners of the said logging truck, the plaintiffs had obtained the insurance policy by a misrepresentation or nondisclosure of a material fact relating to ownership. The defendant is thereby entitled to repudiate liability under the said policy on account of such breach;

10.2 that the plaintiffs' claim which is founded upon the allegations contained in para 4(a), (b) & (c) of the amended statement of claim does not constitute loss which is covered under the said insurance policy as the loss and damage allegedly sustained by the said logging truck was not attributable to 'accident collision' within the cover insured or provided under the said insurance policy. Wherefore the plaintiffs' claim discloses no cause of action against the defendant and is not maintainable in law. Alternatively, the action is misconceived in law. The said logging truck was not damaged by a 'collision' with another object but was damaged by the cargo it was carrying which was an uninsured risk;

10.3 the plaintiffs' claim is subject to and excluded by the sinking exclusion endorsement which forms part of the said insurance policy. Upon the allegations contained in paragraph 4(a) (b) & (c) of the statement of claim, the proximate cause of damage to the said

logging truck was due to the said logging truck sinking in the soft mud at the side of the road. Wherefore the plaintiffs' claim is excluded under the said insurance policy and not recoverable in law;

10.4 that the plaintiffs in completing the defendant's special perils proposal form dated 17 December 1992 had misrepresented or otherwise failed to disclose that the said logging truck had been altered contrary to the manufacturer's standard specifications when the plaintiffs in response to question 1(c) in the Form when asked to give particulars of whether the said logging truck is altered in any way from the manufacturer's standard specification had replied in the negative. By the plaintiffs' own admission in para 4(c) of the statement of claim, the said logging truck had been reconditioned. The plaintiffs had thereby obtained the said Insurance policy by a misrepresentation or nondisclosure of material fact since the special perils proposal form forms the basis for the said insurance policy. Further or alternatively, the reconditioning done by the plaintiffs to the said logging truck without the prior consent of the defendant constitute a breach of the policy condition in the insurance policy which entitles the defendant to repudiate liability. Wherefore the defendant is under no liability to the plaintiffs or any one of them; and

10.5 that the plaintiffs had obtained the insurance policy by a misrepresentation or non-disclosure of material fact in relation to question three of the defendant's special perils proposal form dated 17 December 1992 when the plaintiffs suppressed the plaintiffs previous claims history in relation to their previous claims for any loss resulting from any of the contingencies required to be insured against by the defendant. As the proposal form forms the basis of the said insurance policy and as the plaintiffs had failed to make full and frank disclosure or is otherwise guilty of non disclosure of the material fact as pleaded herein, the defendant is under no liability to the plaintiff or any one of them under the said insurance policy.

(11) If, however, it be held by this honourable court that the plaintiffs' claim is covered by the defendant's said insurance policy (which is denied), the defendant will, in such event, deny that the plaintiffs or any one of them are entitled to recover the full insured sum of RM250,000 on the following grounds:

11.1 subject to the plaintiffs proving their loss and damage to the said logging truck, the defendant avers that any claim under the said insurance policy is subject to a deductible of RM7,500 minimum per unit or 10% of loss value whichever is higher. The claim is further subject to endorsement 9P19 and replacement parts clause

which forms part of the policy whereby the liability of the defendant in respect of loss and damage shall not exceed the current market value subject to depreciation;

11.2 the said logging truck is not a total wreck nor is the plaintiffs entitled to claim loss and damage on a total loss or constructive loss basis; and

11.3 the plaintiffs and/or the driver of the said logging truck is wholly guilty of negligence and/or guilty of contributory negligence.

Particulars of negligence

(a) that the driver was driving the said logging truck at an excessive speed when going down or descending the slope or negotiating the slope;

(b) that the driver had overloaded the said logging truck with timber logs over and above the capacity of the said logging truck such that the braking system of the said logging truck was not sufficient to service the said logging truck when going down the slope or negotiating the slope; and

(c) that the driver had failed generally to take all reasonable care in the circumstances to avoid loss and damage to the said logging truck.

12 Defendant will aver that the allegations contained in para 7 of the amended statement of claim does not constitute a cause of action against the defendant. In any event, the defendant further avers as follows:

12.1 the defendant first had knowledge of the accident based on second plaintiff's letter dated 19 November 1993 addressed to the defendant's agent Perissos Corp Sdn Bhd;

12.2 the defendant denies the plaintiffs' allegations that the plaintiffs, their servants or agents were not at fault or breached any of the conditions of the said insurance policy. In rebuttal, the defendant will rely on its defences set out in paras 1 to 11 hereof; and

12.3 save as averred in sub-paras 12.1 and 12.2 hereof, the defendant denies all the allegations in para 7 of the amended statement of claim.

13 The defendant admits para 8 of the amended statement of claim but avers that it is not precluded from raising other grounds as contained hereinabove to repudiate liability under the said insurance policy.

14 The defendant in defence to para 9 of the amended statement of claim will rely on its defences pleaded in para 10.1 hereof which the defendant repeats verbatim.

15 The defendant does not admit para 10 of the amended statement of claim and the plaintiffs are put to strict proof.

16 The defendant is not legally obliged to comply with the plaintiffs' alleged demand in para 11 of the amended statement of claim. In any event, the defendant will rely on paras 11.1 to 11.3 hereof which the defendant repeats herein verbatim to resist the plaintiffs' alleged claim for the sum of RM250,000.

17 In defence to para 12 of the amended statement of claim, the defendant avers that the allegations therein contained do not afford the plaintiffs a cause of action against the defendant herein nor is the defendant precluded from repudiating liability in the instant alleged claim by the plaintiffs. In any event, the defendant will aver that the previous settlement by it was made under a mistake of fact and/or law under circumstances which the defendant are not legally obliged to offer settlement. Alternatively, it was effected purely out of goodwill and/or on an *ex gratia* basis.

18 Wherefore in view of all the above defences, the defendant is under no liability to the plaintiffs or each of them or at all.

19 Save as is hereinbefore expressly admitted, the defendant denies each and every allegations contained in the amended statement of claim if the same were herein set out and traversed seriatim.

[4] In respect of Summons No 52–04 of 1996 the parties are the same. In this suit the plaintiffs' claim is in respect of another logging truck bearing registration No SU 3187 and a trailer bearing registration No SU 3189. Though the claim is somewhat similar to Summons No 52–03 of 1996, there are differences. The amended statement of claim is as follows:

1. The plaintiffs are the legal owner of a unit of Pacific Logging Truck bearing chassis No P-8199/1634, Engine No 10949091 and registration No SU 3187 together with a trailer bearing registration No SU 3189 and chassis No F81/5351 (the said vehicle).

2. The defendant is an insurance company with an office in Kota Kinabalu and Sandakan, Sabah and sells insurance policies.

3. Since 1988, the plaintiffs had been purchasing a special perils policy from the defendant in respect of the 16 units of logging trucks purchased from B-Trak Sdn Bhd vide an agreement dated 1 December 1987 and the said policy was renewed year to year and from 17 December 1992 until 16 December 1993 under insurance policy No. N993TA000005 (the said insurance policy). Under the said insurance policy, the said vehicles were insured for a sum of RM250,000.

4. (a) On or about the 14 December 1993, the said logging truck was driven by an employee of the plaintiff one Richando Saavedra Enviquez (the driver) while working in a timber camp at Ng Gaat, Kapit, Sarawak. The timber camp is known as Umas Camp B.

The driver and truck combination have been working in this very hilly area for nearly one and a half years.

(b) At the material time the said logging truck was loaded with logs and as per the industry standard practice the driver have just rechecked the trucks radiator, engine oil, steering system oil, compressed air tanks, capacity, the brake drums on both the tractor head and trailer and the water tank and related valves, distribution hoses and the jet nozzles. Finally the tyres were rechecked for general condition and proper inflation.

Every driver will do this every trip and if the trip is of some distance and taking the load and terrain into consideration he may recheck one or two times more along the way.

The driver does all these checking and rechecking because the trip ahead is a potentially dangerous one and any malfunction of the mentioned components and systems may prove fatal to him. The job demands skills and courage and in return potentionally and usually the highest pay of all the occupations that makes up a timber camp.

5. Under condition 7 of the insurance policy the plaintiffs shall take all reasonable steps to safeguard the said vehicles insured from loss or damage and to maintain them in efficient condition and the defendant shall at all times have free and full access to examine the said vehicles or any part thereof or any operator or employee of the plaintiff.

The plaintiffs aver that the said vehicles were maintained in an efficient manner of high standard.

Particulars of maintenance

(1) The plaintiffs' family business of timber extraction and processing goes back to 1946 where buffaloes were used to pull logs till today when sophisticated purpose built machines were introduced and used.

The plaintiffs have the benefits of continuous up grade in technologies and the increasing numbers of trained to highly trained personnel to maintain the machines. Some of our mechanics are second generation workers.

Sabah and Sarawak logging industry is full of case histories whereby one company after another have failed because of one factor - lack of maintenance skills towards the machineries purchased. The list of companies known to the defendant can be nominated.

After 49 years in the industry continuously, the plaintiffs would have long ago gone bust if they did not maintain their machines properly and efficiently. This would hold true with the buffaloes in 1946.

(2) The plaintiffs' family business have been active as one of Sabah's original 16 concessionaires in logging and processing, as a private logger to the job of contractor to Yayasan Sabah and other special licence and concessionaire. Today trucking is the Plaintiffs' main source of income and the fact is a lack of proper maintenance will very very soon lead to a truck that would be dangerous to drive. A professional trucking contractor cannot field such a truck besides no driver will dare drive it knowingly.

Any thing short of full and proper maintenance will definitely mean a loss of driver, truck and income and so much misery to co-workers and families involved.

(3) The plaintiffs have established a reputation over the years as being very good in rebuilding heavy equipment and especially logging trucks to as new condition. It can be established that at least 25 used and non operational logging trucks have been bought, fully reconditioned including the unit involved in this case and put to work in Sabah and Sarawak.

The insurance policy covering these trucks will indicate how the plaintiffs' trucks were maintained, and one does not insure a 1981 logging truck for RM300,000 unless it is well maintained and the plaintiffs are not talking about just one truck.

The plaintiffs are able to call some professionals to come from the USA, West Malaysia, Singapore and Sarawak to testify to the plaintiffs well known policies and skills of reconditioning and maintenance of logging trucks.

(4) The first plaintiff is a director and shareholder to a spare-parts company, namely SRI SANGITAN SDN BHD and at any time the plaintiffs have over a million ringgit of truck spares to support the plaintiffs' trucks. The plaintiffs have been importing part of their spare parts requirement since 1958 when they became the first company to use logging trucks in the Kinabatangan.

At the material time of the accident the plaintiffs have over RM300,000 of spares in their store at camp meant specifically for the maintenance of the logging trucks.

(5) At the material time the plaintiffs have the services of very good mechanics, the chief mechanic having been with the company for more than 15 years. Most of the team of mechanics have been with the plaintiffs since the 1980s and some since the 1970s. There are no strangers to the fleet of trucks they have been maintaining for so many years.

(6) All the maintenance inputs to a truck, any truck will be ineffective and soon suffers premature break down if the last man, the driver does not have the right attitude, right skills, right application of simple mechanical devices meant for regular use on every trip, ie, an oil can, tire pressure gauge adjusting spanners etc. Basically the driver is the first and last person to be maintaining his truck by checking and rechecking before, during and after every trip. This practice can be observed any day as it is an absolute necessity to his life during every trip.

Driver of the Pacific Truck, Mr Richardin Enviquez is one of the last of the breed there is an experienced highly praised and recognized man by many coworkers and managements of various companies he worked for. His commission income over the years avers well towards this.

(7) Plaintiffs further aver that the defendant failed to examine the said vehicles for the purpose of ascertaining whether the said vehicles were maintained in an efficient manner. If the defendant's servants or agents had done so they would have found the said vehicles to have been in excellent condition and thus operational order.

(8) The cause of the accident was wholly caused by the unexpected failure of some thing in the braking system and not due to the fault or negligence of the plaintiffs, their servants or agents of all the dedicated heavy equipment. Anyone experienced with the logging industry knows the importance of maintaining the logging trucks as 80 tons of logs is a lot of weight to come crushing on the driver. Every driver knows many have been killed by crushing logs and is most likely to choose staying alive than drive a logging truck lacking adequate maintenance.

(9) The plaintiffs over the years have designed and developed many improvements towards maintenance efficiency and these can be seen even on the destroyed truck.

The truck have water heat transfer for the gearbox and front rear and rear axles which is recognized as original in the industry.

The plaintiffs have developed and have their own tooling moulds to cast polyurethane suspension bushing in Australia.

Special high performance lubricants have been specially blended by Formil Advance Lubricants in Singapore for improved maintenance.

Special advance technologies products have constantly been sought after from the USA, Australia, Germany as correspondence with the following companies indicates:

(a) Lemforder of Germany.

(b) Power Down, Ironman, Tayco, Mckay Rubben etc of Australia.

(c) Severson, acting gears, Bens Trucks Eatons, Fullers of the USA.

The Plaintiffs have even repeatedly requested a special Brake Drum manufacturer to make drums to suit their trucks as they have an extra safety factor. They have also requested a major retailer in the USA to approach this Brake Drum Co motor wheel of Lansing, Michigan, USA.

Even the trucks batteries have been attended to with latest technologies battery gel to improve service life of the units.

The destroyed truck and other trucks in the fleet have been fitted with replacement R4 grade hydraulic hoses and fittings which are rated much higher than is supplied by the OEM. This extra expenses actually saves money in the long run and provides better safety to the driver.

The brake drums used are steel belted durametal generally acknowledged as superior in quality and thus safety and for the particular size no better other brand can be bought.

Even the cabin of the truck have been modified in its mountings so as to insulate the driver from the most severe shocks and springing and dampering.

The driver safety level have been further increased with the addition of two carefully designed high tensile beams just behind the cab.

What team of men and company will go to such extends to extend to the very latest known and available technologies to improve the

safety of the driver and performance of his truck and then to neglect the proper maintain of the baking system.

The defendant's inspector never pointed out to any hose believed to have ruptured. It could have been pointed out to him that the hoses on the truck have been upgraded to R4 grade just the previous year.

The plaintiffs aver that the said driver of the truck would have stopped it where the accident happened as the slope was very gentle but unfortunately the earth at the side of the road was very soft and the driver had steered straight into it without knowing it was so soft. The rate of deceleration was too rapid when the truck sank in the mud causing the logs to rushed foreward.

6. The defendant has knowledge of the accident and had inspected the vehicle and had found that the plaintiffs, their servants or agents were not at fault or breached any of the conditions of the said insurance policy.

7. On or about 10 March 1995, the defendant wrote to the plaintiffs to inform them that the defendant was repudiating the said insurance policy because the plaintiffs did not have any insurable interest over the said vehicle as the ownership had not yet registered yet.

8. The plaintiffs had paid for the said vehicle when the same was purchased from B-Trak Sdn Bhd on or about 1 December 1987 and the legal ownership vests in the plaintiffs' registration is only the document of title and since the plaintiffs had fully paid for the said vehicle, they are the legal owner and therefore has an insurable interest over the said vehicle.

9. The defendant is liable to pay under the said insurance policy as the said vehicle was totally damaged beyond repair due to an accident.

10. Despite a demand made on the defendant to pay the sum insured, the defendant refused, failed and neglected to pay the sum of RM250,000.

11. The defendant had in a claim made by the plaintiffs in respect of the policy purchased from the defendant compensated the plaintiffs for the loss of vehicles bearing registration Nos SB 4056 and SB 4062 under claim No. N9910002, Policy No N991TA00010 when an accident occurred on 6 January 1991. The defendant therefore had no basis to repudiate the said insurance policy on this ground. The plaintiffs are the legal owner in this case and although their name was not registered in the registration card.

And the plaintiffs claim against the defendant:

A (a) the sum of RM250,000 together with interest at 8% per annum from the 14 December 1993 until full payment under s 11 of the Civil Law Act 1956.

(b) Costs

B Court fees RM 100

Solicitor fee RM2,875

(c) Further or other reliefs as the court deems fit.

C

[5] The amended statement of defence of the defendant states:

1. The defendant does not admit para 1 of the amended statement of claim and the plaintiffs are put to strict proof.

D

2. In amplification of para 1 hereof and without prejudice thereto, the defendant avers as follows:

2.1 as the first plaintiff was at all material times trading as Sri Gemawan E Sdn Bhd, who is the abovenamed second Plaintiff herein, the second plaintiff as such has no *locus standi* to commence this action against the defendant. Alternatively, the first plaintiff has no *locus standi* to commence this action against the defendant since the second plaintiff was already a party to the proceedings. It is a duplicity for F both the first and second plaintiffs to be joined as parties to the action in their capacity as plaintiffs in the action;

2.2 the third and fourth plaintiffs have no locus standi nor any legal interest to commence this action against the defendant since:

G

2.2.1 the third and fourth plaintiffs have not submitted any claims against the defendant. The defendant's motor vehicle accident report/claim Form dated 20 December 1993 was only submitted by the first plaintiff solely for himself. Further notification of H claim under the defendant's insurance policy was only given by the first plaintiff trading as the second plaintiff under the second plaintiff's letter dated 16 December 1993 to the defendant's agent and not by the other third and fourth plaintiffs; and

2.2.2 further or alternatively, as the defendant had received no I notification of claim from the third and fourth plaintiffs within the deadline stipulated in the defendant's insurance policy which is a condition precedent of claim, the defendant is under no liability towards the third and fourth plaintiffs. The defendant is entitled to avoid liability under the said insurance policy.

3. The rest of the defendant's defences hereinbelow is without prejudice to paras 1 and 2 hereof but subject to the same.

4. The defendant admits para 2 of the amended statement of claim.

5. The defendant also admits para 3 of the amended statement of claim.

6. The defendant does not admit para 4(a) and (b) of the amended statement of claim including sub-paras (1) to {5) thereof inclusive and the plaintiffs are put to strict proof.

7. In defence to para 4(5) of the amended statement of claim in connection with the alleged reporting of the alleged accident, the defendant only admits that notification of claim was given by the first plaintiff trading as the second plaintiff but not from the third and fourth plaintiffs. The defendant will rely on paras 2.1.1 and 2.1.2 hereof which the defendant repeats herein verbatim.

8. Save for condition 7 of the insurance policy as alleged in para 5 of the amended statement of claim, the rest of the allegations in the entire para 5 from sub-paras (1) to (9) inclusive are not admitted by the defendant and the plaintiffs are put to strict proof.

9. The defendant admits para 6 of the amended statement of claim but denies that they had failed, neglected and/or refused to pay the sum claimed as alleged by the plaintiffs. The defendant further avers that they have valid legal reasons not to pay the plaintiffs as disclosed in this statement of defence.

10. Notwithstanding the above averments, the defendant denies liability to the Plaintiffs or any one of them based on the defendant's insurance policy No N993TA000005 on the following grounds:

10.1 that the third and fourth plaintiffs or each of them have/has no insurable interest in the said vehicle at the inception of the said insurance policy as the third and fourth plaintiffs or each of them were/was not the registered legal owner/s of the said vehicle. At the inception of the said policy, the legal ownership of the said vehicle was registered in the name of the first plaintiff only. The plaintiffs including the first and second plaintiffs had thereby misrepresented or alternatively, by not disclosing that the third and fourth plaintiffs are not the registered legal owners of the said vehicle, the plaintiffs had obtained the insurance policy by a misrepresentation or non-disclosure of a material fact relating to ownership. The defendant is thereby entitled to repudiate liability under the said policy account of such breach;

10.2 that the plaintiffs' claim which is founded upon the allegations contained in para 4(a) & (b) of the amended statement of claim does

not constitute a loss which is covered under the said Insurance Policy as the loss and damage allegedly sustained by the said logging truck was not attributable to 'accident collision' within the cover insured or provided under the said insurance policy. Wherefore the plaintiffs' claim discloses no cause of action against the defendant and is not maintainable in law. Alternatively, the action is misconceived in law. The said vehicle was not damaged by a 'collision' with another object but was damaged by the cargo it was carrying which was an uninsured risk;

10.3 that further or alternatively, the proximate cause of the damage to the said vehicle was attributed to brake failure and not 'accident collision'. The brake failure is a breach of policy condition No 7. The plaintiffs' claim is therefore not covered neither is it insured under the said insurance policy wherefore the defendant is under no liability to the plaintiffs;

10.4 that the plaintiffs' claim is subject to and excluded by the sinking exclusion endorsement which forms part of the said Insurance Policy. Upon the allegations contained in para 4(a) & (b) of the amended statement of claim, the proximate cause of damage to the said vehicle was due to the said vehicle sinking in the soft mud at the side of the road. Wherefore the plaintiffs' claim is excluded under the said insurance policy and not recoverable in law;

10.5 that the plaintiffs in completing the defendant's special perils proposal form dated 17 December 1992 had misrepresented or otherwise failed to disclose that the said vehicle had been altered contrary to the manufacturer's standard specifications when the plaintiffs in response to question 1(c) in the Form when asked to give particulars of whether the said vehicle is altered in any way from the manufacturer's standard specification had replied in the negative. By the plaintiffs' own admission in para 5(9) of the amended statement of claim, the said vehicle had been modified contrary to the manufacturer's specifications. The plaintiffs had thereby obtained the said insurance policy by a misrepresentation or non-disclosure of a material fact since the special perils proposal Form forms the basis for the said insurance policy. Further or alternatively, the modifications done by the plaintiffs to the said defendant and without the prior consent of the defendant constitute a non- disclosure of material fact/s and also a breach of the policy condition in the insurance policy which entitles the defendant to repudiate liability. Wherefore the defendant is under no liability to the plaintiffs or any one of them; and

10.6 that the plaintiffs had obtained the insurance policy by a misrepresentation or non-disclosure of material fact in relation to

question three of the defendant's special perils proposal form dated 17 December 1992 when the plaintiffs suppressed the plaintiffs' previous claims history in relation to their previous claims for any loss resulting from any of the contingencies required to be insured against by the defendant. As the Proposal Form forms the basis of the said Insurance Policy and as the plaintiffs had failed to make full and frank disclosure or is otherwise guilty of non-disclosure of the material fact as pleaded herein, the defendant is under no liability to the plaintiff or any one of them under the said insurance policy.

11. If, however, it be held by this honourable court that the plaintiffs' claim is covered by the defendant's said insurance policy (which is denied), the defendant will, in such event, deny that the Plaintiffs or any of them are entitled to recover the full insured sum of RM250,000 on the following grounds:

11.1 subject to the plaintiffs proving their loss and damage to the said vehicle, the defendant avers that any claim under the said Insurance Policy is subject to a deductible of RM7,500 minimum per unit or 10% of loss value whichever is higher. The claim is further subject to endorsement 9P19 and replacement parts clause which forms part of the policy whereby the liability of the defendant in respect of loss and damage shall not exceed the current market value subject to depreciation;

11.2 the said vehicle is not a total wreck nor is the Plaintiffs entitled to claim loss and damage on a total loss or constructive loss basis; and

11.3 the plaintiffs and/or the driver of the said vehicle is wholly guilty of negligence and/or guilty of contributory negligence.

Particulars of Negligence

(a) that the driver was driving the said vehicle at an excessive speed when going down or descending the slope or negotiating the slope;

(b) that the driver had overloaded the said vehicle with timber logs over and above the capacity of the said vehicle such that the braking system of the said vehicle was not sufficient to service the said vehicle when going down the slope or negotiating the slope; and

(c) that the driver had failed generally to take all reasonable care in the circumstances to avoid loss and damage to the said vehicle.

12. The defendant will aver that the allegations contained in para 6 of the amended statement of claim does not constitute a cause of action

against the defendant. In any event, the defendant further avers as follows:

12.1 the defendant first had knowledge of the accident based on the second plaintiff's letter dated 16 December 1993 addressed to the defendant;

12.2 the defendant denies the plaintiffs' allegations that the plaintiffs, their servants or agents were not at fault or breached any of the conditions of the said insurance policy. In rebuttal, the defendant will rely on its defences set out in paras 1 to 11 hereof; and

12.3 save as averred in sub-paras 12.1 and 12.2 hereof, the defendant denies all the allegations in para 6 of the amended statement of claim.

13. The defendant admits para 7 of the amended statement of claim but avers that it is not precluded from raising other grounds as contained hereinabove to repudiate liability under the said insurance policy.

14. The defendant in defence to para 8 of the amended statement of claim will rely on its defences pleaded in para 10.1 hereof which the defendant repeats verbatim.

15. The defendant does not admit para 9 of the amended statement of claim and the plaintiffs are put to strict proof.

16. The defendant is not legally obliged to comply with the Plaintiffs' alleged demand in paras 10 of the amended statement of claim. In any event, the defendant will rely on paras 11.1 to 11.3 hereof which the defendant repeats herein verbatim to resist the plaintiffs' alleged claim for the sum of RM250,000.

17. In defence to para 11 of the amended statement of claim, the defendant avers that the allegations therein contained do not afford the Plaintiffs a cause of action against the Defendant herein nor is the defendant precluded from repudiating liability in the instant alleged claim by the plaintiffs. In any event, the defendant will aver that the previous settlement by circumstances which the defendant are not legally obliged to offer settlement. Alternatively, it was effected purely out of goodwill and/or on an *ex gratia* basis.

18. Wherefore in view of all the above defences, the defendant is under no liability to the plaintiffs each of them or at all.

19. Save as is hereinbefore expressly admitted, the defendant denies each and every allegations contained in the statement of claim as if the same were herein set out and traversed seriatim.

[6] The learned sessions court judge dismissed the plaintiffs' claim. On appeal to the High Court the learned judge dismissed the appeal and affirmed the decision of the sessions court judge. As can be seen from the judgment the basis of the claim by the plaintiffs in summons No 52–03 of 1996 is the claim in respect of vehicle Kenworth Logging Truck registered as SK 1921 and its trailer registered as SK 1922(KLT). The claim in Summons No 52–04 of 1996 is in respect of Pacific Logging Truck with registration No SU 3189 and its trailer ('PLT'). In his judgment the sessions court judge ('SCJ') had identified the issues correctly:

(1) Whether the plaintiffs or any one of them have/has any insurable interest as at the date of the Cover Note No NG 92–003985 dated 17 December 1992? Whether the plaintiffs are the legal owners of the KLT and the PLT in order to sustain their cause of action? Whether all the plaintiffs or anyone of them have/has any locus standi or legal interest to commence the summons against the defendants?

(2) Whether the defendants are entitled to avoid the Special Perils Policy and repudiate liability on the Ground 5 — that the plaintiffs or anyone of them had obtained the Special Perils Policy by misrepresentation or non-disclosure of a material fact in relation to Question 3 of the Defendant's Special Perils Policy Form dated 17 December 1992.

Further down in his judgment the learned SCJ said:

> In the Special Perils Proposals, the name of the proposers were stated as: Mr Chung Kuo Ping @ Richard T/A Sri Gemawan S/B, Chung Chao Lung Timber (Contracting) Company S/B and Rapid Growth S/B. In the Cover Note dated 17 December 1992, the same three names of proposers were stated. On the Schedule attached to the said Cover Note, 'The Insured' are mentioned as the same three entities respectively as stated in the Cover Note. There are 16 logging trucks covered, including the KLT and the PLT in question. The total premium paid was presumably RM105,002, and the total sum insured was RM4,000,000.
>
> In the 'Buku Pendaftaran' concerning the KLT, under 'Tukarnama Pertama,' it is stated, 'Sri Gemawan S/B' (SGSB). Under 'Tukarnama Kedua,' the owner's name is mentioned as: 'Sri Sangitan S/B,' and the transfer appears to have been effected on 5 October 1995. PW1 would later in his testimony reveal that SGSB has been wound up sometime after January 1996.
>
> In *Halsbury's Laws of Malaysia*, Vol. 4, Malayan Law Journal SB 2000, under para 60.034, at p 37, it is stated: 'With regards to an insurable interest in property, the general principle for Malaysia would be that an insurable interest should exist at the time the event causing the loss occurs. Thus, an owner of a car who has sold it, would not be able to recover from a motor policy which has not yet expired if the car is damaged in the hands of the new owner.
>
> Going by plaintiff's bundle of documents (PBOD) pp 29 to 31, as amplified by exh P1 and exh P2, and also based on PW1's evidence, the KLT was transferred presumably from the first Plaintiff to SGSB (second plaintiff) only on 20 March

A 1995. Hence, on 17 November 1993 ie, when the event that caused the loss occurred, it is probable that SGSB was not the legal owner, thereby rendering SGSB, at that time, to have no insurable interest in the KLT.

Cross-examined – despite the two transfers from himself (PW1) to SGSB and from SGSB to Sri Sengitan SB — whether he (first plaintiff) still maintains he still owns
B the KLT, initially PW1 replied, 'No'. Upon the question being repeated, he answered, 'Not sure'. In re-examination, however, PW1 maintains he is still the legal owner of the said truck, saying, 'I have custody of this truck since the day in 1987 when I bought it from B-Track SB.

In cross-examination, PW1 says the KLT was bought using both his and his
C companies' (presumably SGSB and Chung Chao Lung Timber (Contracting) Company SB) funds. PW1 could not remember what is the proportion of the purchase price concerning which companies' funds was used to pay. But he says his personal cheques was 'about RM400,000'.

Cross-examined that by 17 December 1992, SGSB rather than PW1 was the
D owner of the KLT, PW1 disagreed. This implies PW1 then had legal ownership of the KLT, and not SGSB. But yet both of them are suing the defendant. Then there is PWI's evidence that he had transferred the KLT to SGSB for 'tax purposes.' He testified to the effect that as he and SGSB owed SSSB over a million ringgit, 'I offered to transfer my KLT at a nominal fee. SSSB accepts that amount and deduct it from my account and SGSB's owing.' He could not recall how much was
E the 'nominal fee.' At another juncture, PW1 would testify his company (presumably SGSB) owns the KLT. Then there is DBOD 17 dated 1 March 1994 addressed to 'M/s Sri Gemawan Sdn Bhd', instead of the first plaintiff personally. In this connection, it is to be noted that on the face of DBOD 18 (Sale Agreement), 'the Buyers' was described as 'Richard Chung Kuo Ping l/C
F H0654172.' There seems to be serious ambiguities as to the actual legal owner of the KLT, particularly in the context of accounting and company law principles.

There is no denial that SGSB and SSSB were incorporated companies. Therefore, based on principles of company law, it is an inescapable fact that the first plaintiff, the second plaintiff and SSSB were separate entities. The transfer of the KLT
G presumably from the first plaintiff to the second plaintiff 'for tax purposes' appears to have been effected in March 1995. The transfer from the second plaintiff to SSSB 'for business purposes' appears to have been effected on 05 October 1995. Adhering strictly to company law principles, it would appear that the first plaintiff no longer had ownership over the KLT since it had already been transferred to
H SGSB in March 1995. It would appear quite perplexing, therefore, how in October 1995, PW1 could still 'offer to transfer my Kenworth Logging Truck' presumably to SSSB, when it was already transferred presumably from himself to SGSB earlier.

...

Therefore, in the instant case, since there had been effective transfer of ownership
I of the KLT presumably from the first plaintiff to the second plaintiff, and thereafter from the second plaintiff to Sri Sangitan SB (SSSB), then the eventual legal owner should be SSSB. However, in this case the cause of action arose in November 1993, and the action was instituted on 8 January 1996. So in November 1993 it seems that there was no 'new' owner of the KLT. But at the time the action against the Defendant was instituted, the 'new' owner was SSSB.

As it turned out, both the first and second plaintiffs (Richard Chung and SGSB) maintain their action against the Defendant concerning the KLT. The third and fourth Plaintiffs [respectively Chung Chao Lung Timber (Contracting) Company SB and Rapid Growth SB] have withdrawn their action against the defendant, presumably because they are not the insured. Anyway, back to the first main issue: do either or both of the first and second plaintiff have any pecuniary interest in the KLT — at the inception of the relevant insurance policy and at the time of the occurrence of the event that caused the loss?

…

PW1 who is also the first plaintiff seems to insist SGSB, the second plaintiff also has insurable interest in the KLT at the time the loss occurred. This necessarily implies that, as PW1 had testified, SGSB did pay, or, at any rate, did contribute towards the payment of the purchase price of the KLT. If that was the situation, then the Plaintiffs would have to prove on balance of probabilities that not only both Plaintiffs did pay for the KLT, but they must also similarly prove how much each of them paid. 'If upon a claim being made the insurer does not admit that the assured had a valid interest at the relevant date, it is for the assured to prove his interest at such date' (see *Macaura v Northern Assurance* [1925] AC 619, 632, as cited in Chitty on *Contracts Specific Contracts*, London Sweet a Maxwell, 27th Ed. 1994).

...

So who could insure the KLT against loss or damage? It seems that based on *Macaura*'s case, and in the circumstances of the instant case, the relevant insurance policy should have been transferred to those who subsequently acquired the right to insure the KLT. So if the KLT was transferred to another entity after the insurance policy renewal and prior to the occurrence of the event that gave rise to the claim, then the policy should have been transferred to the transferee in ownership.

…

It seems noteworthy, however, that the 'Declaration' in the said Special Perils Proposal dated 17 January 1992, was signed by the first plaintiff (PW1) 'For Sri Gemawan SB' But the names of the proposers were written therein as 'Mr. Chung Kuo Ping @ Richard T/A Sri Gemawan S.B., Chung Chao Lung Timber (Contracting) Company SB and Rapid Growth SB' The same three entities were listed as 'the insured' in the resultant Cover Note (DBOD 4-9) dated 17 December 1992. The first plaintiff (PW1), by himself personally, was not listed as one of the insured, but rather 'Mr. Chung Kuo Ping @ Richard Chung T/A Sri Gemawan S.B.' At that time, it seems there was uncertainty as to whether PW1, by himself, or SGSB, itself, was among the insured. What is stated in the said cover note is only Mr Chung Kuo Ping @ Richard Chung 'trading as' Sri Gemawan SB. Now, is that description meant to indicate Mr. Chung Kuo Ping @ Richard Chung (although trading as SGSB) as one of the insured, or is it meant to indicate SGSB to be one of the insured (Mr. Chung Kuo Ping @ Richard Chung being only one of the 'shareholders' in SGSB), or is it meant to indicate that each of both Mr. Chung Kuo Ping @ Richard Chung and SGSB is among the insured? Clearly, as earlier indicated, there is serious ambiguity in this respect. Surely at the

A date of the said Special Perils Proposal (17 December 1992), knowledge as to the ownership of each of the trucks (as per DBOD 4, 5, 6, 7, 8) should have been well within PWI's power, capability and, perhaps, duty to ascertain. So why the serious ambiguity?

B ... In fact, based on PW1's evidence, it seems quite clear, that he has not proven on balance of probabilities, his or the second Plaintiff's having insurable interest concerning the KLT. In respect thereto, neither has any resulting trust been similarly proven, i.e. that his companies used their funds to buy the KLT for the first Plaintiff's benefit, whereby the first plaintiff (PW1) would have been given insurable interest proportionate to the contribution of the purchase price from his

C companies.

From the submissions of both parties, it would appear that 'insurable interest' must necessarily involve 'pecuniary interest in the subject matter of the insurance.' The assured must necessarily be interested in the value of the thing concerning which he could recover insurance compensation, in case the indemnity contract he

D and the insurers had entered into is 'activated.' In determining the value to be insured, it seems that it would be up to the insured to let the insurers know the amount — how much he would like the subject matter to be insured for. In determining such amount, the insured must necessarily have in mind the extent of his insurable interest in the subject matter. So if he intends to claim for the full

E extend recoverable, the irresistible implication is that he must have a right to claim that amount.

The question then arises as to the basis upon which the insured rests his right to claim. The basis for such a claim must necessarily be based upon something such as ownership, trust or perhaps, bailment. In other words, at the inception of the

F policy, and at the time the event that gave rise to the claim occurs, such matters must or should have been contemplated, and if later required, must necessarily be shown to exist by the insured i.e. in relation to the goods he insures. Otherwise, how could it be shown that his insurable interest has any pecuniary value ie,between him the insured and the goods, property or subject matter insured? In the context of the precept that 'An interest to be insurable must have a pecuniary

G value,' (see plaintiffs'counsel's submission dated 29 November 2000 p 3, para 4, quoted from *General Principles of Insurance Law* by ER Hardy Ivamy, London Butterworths 1979), the submission of the learned counsel for the Defendants on the issue of trust, with respect, would be relevant and material, contrary to the contention of the learned counsel for the plaintiffs. Even in the context of similar

H principle, it would appear necessary to prove on a balance of probability, not only that there was contribution towards the purchase price, but also to ascertain precisely how much. This was not done.

In the circumstances, the plaintiffs have not proved on balance of probabilities, that either or both of them has/have any insurable interest in the KLT. Neither has

I it been established on balance of probabilities that either or both plaintiffs is/are the legal owners of the KLT. Further, neither plaintiffs has any *locus standi* or legal interest to commence the summons against the defendants.

[7] The above citation of the judgment of the SCJ clearly shows that he was

correct in his judgment and conclusion. He has correctly stated the law pertaining to insurance. In both the proposal note and the insurance policy in respect of the KLT and the PLT, the person named as the insured is stated as Mr. Chung Kuo Ping @ Richard T/A Sri Gemawan Sdn Bhd, Chun Chao Lung Timber (Contracting) Company Sdn Bhd and Rapid Growth Sdn Bhd (p 657 of the record). The registration card of the KLT and its trailer have the name of Sri Gemawan as the owner and this took place in 1995. Prior to this the registered owner as stated on the registration card was Perusahaan Far (Sabah) Sdn Bhd. The name of Chung Kuo Ping @ Richard (first plaintiff) could not be found on the registration card of the KLT. The first plaintiff claimed that he was the owner because he was the one who purchased the KLT from B-Trak Sdn Bhd and the payment was made in cash. The learned SCJ pointed out that the first plaintiff himself gave evidence that some of the payments were made by Sri Gemawan Sdn Bhd, some by the third Plaintiff, some by the fourth plaintiff and some by himself. What was not shown was the amount each plaintiff paid. Despite the evidence of the first plaintiff in respect of the payments, the letter from B-Trak Sdn Bhd dated 1 March 1994 (at p 715) shows that the purchaser was Sri Gemawan Sdn Bhd. That letter is the letter releasing the claim by B-Trak Sdn Bhd and thus allowing Sri Gemawan to be registered as the owner of the vehicle. As correctly pointed out by the learned SCJ, in order for the first Plaintiff to make a claim it must be shown that he was the owner or at least in possession of the vehicle when the accident took place. The first plaintiff failed to prove that he was the owner or was in possession of the said vehicle. When the accident took place, Sri Gemawan Sdn Bhd (second plaintiff) registered itself as the owner of the said vehicle only in 1995 despite the fact that it received the release letter from B-Trak Sdn Bhd dated 1 March 1994. Anyway, the accident occurred earlier than those dates.

[8] Turning to the proposal form and the insurance policy the person named to be insured in the proposal form and the person named as the insured is Mr. Chung Kuo Ping @ Richard T/A Sri Gemawan Sdn Bhd, Chung Chao Lung Timber (Contracting) Company Sdn Bhd and Rapid Growth Sdn Bhd. In our view, there is no such legal entity. The evidence shows that Mr. Chung Kuo Ping @ Richard is an individual. On the other hand, Sri Gemawan Sdn Bhd, Chung Chao Lung Timber (Contracting) Company Sdn Bhd and Rapid Growth Sdn Bhd are three different companies incorporated under the Companies Act, 1965. These are the plaintiffs in the original claims in the Sessions Court. As can be seen, each of them has separate legal entity. It is clear to us that there is no legal entity of Chung Kuo Ping @ Richard T/A Sri Gemawan Sdn Bhd, Chung Chao Lung Timber (Contracting) Sdn Bhd and Rapid Growth Sdn Bhd.

[9] First of all, Chung Kuo Ping @ Richard cannot be trading as (T/A) an

incorporated company or on behalf of an incorporated company. We noted that the first plaintiff is a graduate of Economics and Law from Sydney University, Australia. With that background he should have known that an individual cannot be trading as a company incorporated under the Companies Act 1965. An individual could only be trading as (T/A) a registered business (a business registered under the Registration of Business Act). When the plaintiffs filled up the proposal form in the manner as shown in the proposal form then the plaintiffs had filled up the proposal form wrongly. Since the insurance policy is based on the proposal form the name of the insured follows the one in the proposal form. Since there is no legal entity named in the insurance policy, none of the four plaintiffs is named in the insurance policy. This is applicable to both the plaintiffs' claim in respect of the KLT and the PLT because the insurance policy covered all the vehicles including the vehicles which are the subject matter in this appeal.

[10] In our view, the SCJ was correct when he came to the conclusion that the plaintiffs have no legal status to commence the present proceedings in the Sessions Court.

[11] Another ground upon which the SCJ dismissed the claims by the plaintiffs was the non-disclosure by the plaintiffs in the proposal form whereby the defendant is entitled to repudiate the insurance. The SCJ said:

> Concerning both KLT and PLT, the defence refers to the special perils proposal dated 17 December 1992, whereby question three states: Have you ever sustained any loss from any of the contingencies to be insured against? To this, the first plaintiff, 'for Sri Gemawan Sdn Bhd', replied: 'No.' The defence then refers to the 'answer to interrogatories' dated 17 July 1996 ie, para 2(b) and (b). 'Answer' (b)(iii) (p 40 of the plaintiffs' bundle of pleadings): 'Claims were made against the American Malaysian Insurance Co. Sandakan for the followings: (iii) Total loss of Pacific Logging Truck in Saindo, Telupid in 1984 and the sum insured was RM400,000. The insurance company paid RM350,000 as compensation.' The same answer was given in case No 52–04 of 1996, on p 49 of the plaintiffs' bundle of pleadings.
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> According to the defence, 'the nett effect of the answers given by the plaintiffs point conclusively to the fact that the plaintiffs had suppressed their previous claims history to the defendants when filing up the special perils proposal form.' The defence submits that 'contracts of insurance are contracts *Uberrimae fidei* and the plaintiffs are under a duty to make full disclosure of material facts. In the first submission, plaintiffs' counsel makes reference to alleged suppression of 'the 2 previous claims' presumably made in 1991. The defendants' counsel's submission, however, refers specifically to the 'Total loss of Pacific Logging Truck in Saindo, Telupid in 1984 …' Learned counsel for the plaintiffs did examine PW1, whether he made other claims against other company in respect of other trucks, but PW1 replied, 'no.' In his 'reply to the defendants' submission', learned counsel for the plaintiffs did not reply to the defendants' counsel's submission that the plaintiffs

had suppressed the said 1984 insurance claims as just mentioned. In the circumstances, it seems quite clear the plaintiffs did suppress their previous claims history pertaining to the said total loss of Pacific Logging Truck in Saindo, Telupid. It would appear, that this ground alone entitles the defendants to avoid the Special Perils Policy and to repudiate liability in respect of both suits (*Syarikat Tai Yuen Supermarket (Tawau) Sdn Bhd v. Mercantile Insurance Sdn Bhd & Anor* [1993] MLJU 381).

[12] The SCJ was absolutely correct in coming to the decision that the defendant is entitled to repudiate the insurance. In *The Asia Insurance Co Ltd v Tat Hong Plant Leasing Pte Ltd* [1992] 1 CLJ 330, on 5 April 1984, the plaintiffs contracted with the defendants to insure a specific crane against loss or damage. In the policy of insurance, the person insured was stated to be the defendants 'and/or hirer'. By an endorsement dated 16 April 1984, the insured was stated to be 'Citibank NA as owner' and the defendants 'as the hirer'. On 27 March 1984, the defendants had already leased the crane to a third party, Shinei. Whilst a standard form of lease agreement was used by the parties, by a side letter it was stated that the defendants (as lessor) shall be responsible for all repairs and maintenance and shall take up all insurance. This side letter is a special arrangement as under the standard form of lease agreement used by the defendants, the responsibility for repairs, maintenance, damages, losses and arranging insurance cover is always with the lessee. On 22 June 1984, whilst the crane was under hire to Shinei, it was damaged. After the surveyors and adjusters had examined the damage, the plaintiffs paid the defendants $78,287.35 in satisfaction of the defendants' claim under the policy. Thereafter, through subrogation rights, the plaintiffs proceeded (in the name of the defendants) against Shinei. It was then that the plaintiffs discovered the special terms of the lease agreement between the defendants and Shinei, and accordingly the plaintiffs discontinued their action. The plaintiffs then filed this action against the defendants, seeking a declaration that they were and have at all times been entitled to avoid the policy on the ground of non-disclosure of the side letter between the defendants and Shinei. They also asked for the return of the money paid to the defendants as money paid under a mistake of fact. The issue before the court was whether the defendants' failure to disclose the contents of the side letter could be said to be a non-disclosure of a material fact. It was held:

(1) An insurance contract is a contract *uberrima fides*. As such it can be avoided for misrepresentation as well as for non-disclosure of material facts. The obligation to disclose material facts arises regardless of whether the assured has been asked to complete a proposal form or had been asked any other questions by the insurer.

(2) The assured is required to disclose all facts within his knowledge which

would affect the mind of a prudent and experienced underwriter in determining whether he will take the risk and if so, at what premium and on what conditions.

[13] In *China Insurance Co Ltd v Ngau Ah Kau* [1972] 1 MLJ 52, the plaintiff/respondent had claimed to be indemnified for the loss of his car. The defendant/appellant company did not dispute the theft but resisted the claim on the ground that the plaintiff in his proposal form had made a declaration false in several aspects. In answer to the questions whether he had made a claim under any motor vehicle policy he had said 'no', and in answer to the question whether he was or had been insured in respect of any other vehicle he gave the name of another insurance company. The plaintiff had, in fact, made a claim but this was more than three years prior to the proposal and he had said he had been advised by the agent that he need not disclose this. Also he left it to the agent to put in the name of the defendant in answer to the second question. The learned trial judge after hearing the evidence of the plaintiff and the agent held that the answers to the questions were not material. On appeal, by majority the Federal Court held:

(1) the answers to the questions had become terms of the contract of insurance and by reason of ss 91 and 92 of the Evidence Ordinance it was not open to the plaintiff to adduce evidence to contradict, vary or add to or subtract from them;

(2) the truth of the answers had been a condition of the policy and it was not open to the trial judge to consider the question whether the answers to these questions were material or not.

At p 58, Ali FJ said:

> Upon a careful perusal of the record it would seem to me that the materiality question was not the only question raised by the defence. In para 5 of the defence statement liability was also denied on the ground that by reason of the basis clause in the contract any misstatement in the proposal form would render the contract void. From the notes of argument counsel for the defence was recorded as having submitted that where parties have stipulated that answers to questions in the proposal form are to be the basis of the contract then if the answers are not true the contract is void. The case of *Condogianis v Guardian Assurance Company Limited* was referred to in support of the contention. This question was not fully argued at the trial and was therefore not considered by the learned trial judge. It has again been raised in this appeal and I think in view of its importance it must be considered.
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> …
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> In this judgment I shall only confine myself to the consideration of the question which was not considered by the learned trial judge. The question is whether, in view of the declaration made by the respondent in the proposal form that the truth

or correctness of the answers and particulars therein were to be the basis of the contract, any misstatement, material or otherwise, would render the contract void. The principle was stated by Lord Blackburn in *Thomson v Weems* as follows (at p 683):

> It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing 'is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material.

In *Dawsons, Ltd v Bonnin & Ors* this passage from Lord Blackburn's judgment was quoted with approval. Admittedly, the judgment in *Dawsons'* case was a majority judgment but the correctness of the principle stated by Lord Blackburn was never in doubt.

In *Dawsons, Ltd v Bonnin & Ors*, the claim was for the loss of the insured lorry by fire. There was a misstatement in the proposal form relating to the address of the garage for the lorry. As in the instant case there was also a declaration in the proposal form that the truthfulness of all the answers was to be the basis of the contract. Likewise the declaration was incorporated in the policy. Viscount Haldane said on p 94:

> … Both on principle and in the light of authorities such as those which I have already cited, it appears to me that, when answers, including that in question, are declared to be the basis of the contract, this can only mean that their truth is made a condition exact fulfillment of which is rendered by stipulation foundational to its enforceability.

On p 97 Viscount Cave said to the same effect as follows:

> …. Upon the whole, it appears to me, both on principle and on authority, that the meaning and effect of the 'basis' clause, taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the policy; and if that be the contract of the parties it is fully established, by decisions of your Lordships' House, that the question of materiality has not to be considered.

Lord Dunedin, also in the majority, agreed with Viscount Cave. Viscount Finlay and Lord Wrenbury who were in the minority took the view that by reason of the fourth condition in the policy the misstatement would not be material to render the policy void. The fourth condition of the policy in *Dawsons'* case, was in these terms:

> Material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or connection with any claim, shall render the policy void.

Fortunately in our case there is no condition similar to the fourth condition which influenced the minority judgment in *Dawsons'* case. On the other hand, condition 9 of the policy in the instant case makes it abundantly clear that the truth of the

statements and the answers in the proposal form is a condition precedent to any liability of the appellant company to make any payment under the policy. The condition reads:

> 9. The due observance and fulfillment of the terms of this policy insofar as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the company to make any payment under this Policy.

The principle which was applied in *Dawsons'* case, in my respectful opinion, must likewise apply to the present case. In *Newsholme Brothers v Road Transport and General Insurance Company, Limited*, Scrutton LJ had the same principle in mind when he said on p 376 this:

> … In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true, 'and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed.

Applying the principle to this case as I do, I cannot escape the conclusion that this appeal must be allowed. …

[14] We are in agreement with the learned High Court judge that there is no merit in the appeal by the plaintiffs/appellant and the appeal is hereby dismissed with costs. The order of the learned sessions court judge is hereby affirmed. The deposit is to be paid to the defendant/respondent to account of taxed costs.

Appeal dismissed.

Reported by Sally Kee